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Supreme Court, U.S.
FILED
MAY 21 2001
OFFICE OF THE CLERK

No. 00-1611

IN THE

SUPREME COURT OF THE UNITED STATES

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**MIGUEL RICHARDSON,**
*Petitioner,*

v.

**GARY L. JOHNSON, Director,**
**Texas Department of Criminal Justice,**
**Institutional Division,**
*Respondent*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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**IMMINENT EXECUTION SCHEDULED**
**FOR 6:00 P.M. JUNE 26, 2001**

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Dr. Eubanks on the way. Unfortunately I neglected to bring it in my briefcase, but it should be here shortly. And, Your Honor, I'll have to ask your indulgence. For those who don't have experience in the domestic violence unit, I've got to ask a few questions that you are going to be very familiar with the answer.

THE COURT: Yes.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Dr. Eubanks, what does the term child abuse mean when it's used by a mental health professional?

A. It means subjecting a child to physical or emotional stressors that are beyond those accepted by society in general as disciplinary tools. There is no complete, I mean, you know, demarcating line saying this is not abuse and this is. It's an area of watershed between strict discipline and abuse, but it's, clinical judgment would say that this is abuse versus this is disciplinary, normal disciplinary tools.

Q. Are you called upon to exercise that professional judgment in the course of your work as a neuropsychologist?

A. Most of the time it has already been determined that that abuse had taken place. I'm sort of the end of the analysis, not at the beginning of the analysis. I confirm it, but not necessarily. I'm not usually the first person to identify that that is the problem.

MR. LANE: Your Honor, may I approach the witness?

THE COURT: You may.

(WHEREUPON, at this time,
(Petitioner's Exhibit No. 26 was
(marked for identification.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Dr. Eubanks, I'm going to hand you what has been marked Petitioner's Exhibit 26 for purposes of identification and ask you to identify that document.

A. It's my Curriculum Vitae. It talks about education, experience, publications, presentations, et cetera.

MR. LANE: Your Honor, Petitioner offers Exhibit 26 into evidence.

MR. SHAUGHNESSY: No objection.

THE COURT: It's admitted.

(WHEREUPON, at this time,
(Petitioner's Exhibit 26 was
(admitted into evidence.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Now, you testified just before I put in your Curriculum Vitae about the definition of child abuse and what is regarded as child abuse, and I want to return to that subject for a moment.

A. Okay.

Q. Does child abuse include both physical abuse and psychological abuse?

A. It does.

Q. I'm going to ask you a number of hypothetical questions and ask you whether these hypothetical situations would constitute child abuse in your opinion.

Suppose a child is beaten with a garden hose or a razor strap for purposes of discipline; would that be regarded as child abuse?

A. I would consider that abuse. Yes.

Q. What about the use of a two-by-four, a two-by-four board or piece of lumber?

A. I would consider that abusive.

Q. What if a child were beaten with a sawed-off broom handle during the course of a school lesson?

A. I would consider that abusive.

Q. Suppose a child was beaten into unconsciousness while tied to a pole?

A. I would consider that abusive.

Q. What if a child was threatened with a knife held to his neck by one of his parents?

A. I would consider that abusive.

Q. And I'm presuming, and I assume you are presuming that in all these circumstances this is a parent who is administering this beating. Is that your assumption?

A. I would consider it abusive if anybody did that to a child.

Q. Would it have a different effect if it's, in fact, the parent who is administering this type of physical abuse?

A. Most likely.

Q. What about stabbing with a knife in the buttocks by a parent?

A. I would consider that abusive.

Q. Would a person, Dr. Eubanks, in your opinion, who suffered all of these things that I've described over a period of years through the age of 16 be considered to have a history of child abuse?

A. I would consider the history, yes.

Q. What is the likely effect, in your professional judgment, of a history of child abuse on a person later in life, say in his mid-twenties?

A. The effects are very widespread, going anywhere from withdrawal and depression, social isolation, to very violent acting out behavior.

Q. Is a victim of child abuse likely to be less capable of functioning socially?

A. Research evidence indicates that to be true.

Q. What sort of observable behavior might result from a history of child abuse?

A. Perpetuation of abuse on the next generation or other people could be one of the indicators.

Q. Okay.

A. A whole range of antisocial behaviors.

Q. Might criminal acts be an observable behavior that might result from a history of child abuse?

A. In as much as antisocial behaviors are often criminal acts, certainly.

Q. What about violent acts towards others?

A. Certainly acting out can be, physical acting out can be a result of child abuse.

Q. Is it possible for a person who has a history of child abuse, or physical abuse as a child, to still regard his childhood as perfectly normal?

A. If the child knows no better and has no reference, and also there can be mechanisms that the child has developed to be able to accept and say this is my life. They certainly could overtly say that this is just the way life is, and not see it as outside of the norm of normal child rearing.

Q. Let me get more specific with you, Doctor. Is it possible for a child that had been beaten and to have seen a sibling beaten before him and still think, still believe that his family and his childhood was normal?

A. I think they certainly could say that and have a superficial conscious belief. I'm sure that there is a lot of unconscious emotional turmoil associated with it under the surface.

Q. What does the term cognitive dismiss mean?

A. Well, it's a psychological concept where something that's just intolerable to you and you are subjected to that untolerableness and you can't escape from it. You accept it.

Q. How would cognitive dismiss manifest itself in a victim of child abuse?

A. That this is normal.

Q. When would such a person actually realize that he had suffered an abusive childhood?

A. If they are able to discover that the type of childhood that he or she had was outside of the norm.

Q. Typically, how does that occur, Doctor?

A. Exposure, being talked about in therapy.

Q. Does the victim of child abuse still love his parents?

A. They can very much love their parents.

Q. May a victim of child abuse still want to believe that his parents were good and decent people?

A. Yes.

Q. If a family lived apart from other families, as in the country, would that make it less likely that the victim of child abuse would recognize his upbringing as having been abusive?

A. They wouldn't have as much reference to other families.

Q. I want to turn to another subject at this time, Dr. Eubanks. What is antisocial personality disorder?

A. It's a subtle behavior seen in individuals that have been characterized by psychiatrists, psychologists, and other mental health professionals to describe an individual's behavior in his or her world that is decidedly against the norm of society and typically causes of these behaviors can cause harm and discomfort to other people.

There is a list of diagnostic categories. The ones that are currently in use come from the Diagnostic and Statistical Manual IV that has been published by the American Psychiatric Association.

Q. Could you tell us what that is? Is that known as DSM-IV?

A. Right.

Q. Could you tell the Court what exactly the DSM-IV, that big thick book you have there in your hand is?

A. In behavioral disorders, we don't have any good analytical test tube type of analyses to be able to say that this is something. You take a serum level and look at cholesterol, we can measure your cholesterol and say that you have 270 milligrams per milliliter and you better go on anti-cholesterol medication. We don't have anything like that in psychology and psychiatry. So symptoms, behaviors, overt kinds of acts need to be analyzed, put into categories, and a consensus developed so that people have an idea about what they are talking about. And over the course of years, the Diagnostic and Statistical Manual has been developed and refined. And right now the fifth version is being worked on.

Q. Well, there was a prior version called DSM-III; is that right?

A. Right. And the revision of that as well.

Q. Let me ask you, when they changed DSM-III to DSM-IV, to the extent that they changed certain tests, certain things that you as psychologists look for, did that mean that what the person was suffering from changed or that the understanding of what the person was suffering changed?

A. Probably - this is not a theoretical book. This is a description of behaviors. It's been carefully made to be atheoretical so that people with different theoretical orientations could still use the same diagnostic criteria. So, these are based upon observable behaviors that most people could agree on. Not necessarily the underlying reasons that those behaviors have emerged.

Q. I want to turn back to antisocial personality disorder, which you testified to a little earlier. Is that disorder caused by anything?

A. Well, as scientific rationalists, everything is caused by something. As far as we know, if there is a combination of variables that are both genetic and environmental that can be looked at, individuals with a diagnosis of a particular disorder, including antisocial disorder, and see that these things have a certain robustness. In other words, there's not necessarily all elements are necessary, but when you see a certain degree of elements in a person who has met the diagnostic criteria in the particular hypothetical case of antisocial personality disorder.

Q. Is a professional psychological establishment recognized that there are a number of factors which may be contributing factors in causing antisocial personality disorder?

A. Yes. As a matter of fact, in a very recent paper published in the American Psychologist, April of 1997, a behavioral geneticist from London by the name of Michael L. Rutter, R-U-T-T-E-R, just published an article called "Nature-Nurture Integration, an example of antisocial behavior, and argues that there are both genetic and environmental factors that contribute to the development of this personality disorder. He also argues that we don't know enough about it to be able to be definitive in what causes the disorder.

Q. Have psychologists in the field recognized that a history of child abuse might be or is a potential contributing factor to antisocial personality disorder?

A. It can be a contributing factor.

Q. Now, I'm going to hand you what has been marked as Exhibit --

MR. LANE: Excuse me. May I approach the witness?

THE COURT: You may.

(WHEREUPON, at this time,
(Petitioner's Exhibit No. 27 was
(marked for identification.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. -- Petitioner's Exhibit 27 for purposes of identification. I'm going to hand you what's been marked as Petitioner's Exhibit 27 and ask you if you have reviewed that document.

A. I have read this document.

Q. Is what I just handed you a report by Betty Lou Schroeder that was prepared after Miguel Richardson was arrested?

A. I assume so. It's marked '81. I think - I don't know when he was arrested, but it was when he was in jail.

Q. Okay. Have you reviewed that report?

A. Yes, I have.

Q. Do you recall what Dr. Schroeder concluded in that report?

A. Her diagnostic impressions were antisocial personality disorder, provisional psycho-sexual disorder, orthopedic problems, headaches, and psychological stressors were legal offenses, health problems and bi-sexuality.

Q. Do you agree with the conclusions she reached in that report?

A. I don't have enough data to agree with her conclusions or disagree with them. She was not allowed to give any psychological diagnostic procedures. Just based apparently on a clinical interview.

Q. Have you also reviewed the affidavit of Julio Richardson that was submitted with the application for habeas relief in this case?

A. Yes, I have.

Q. Let me ask you, if you were to examine Miguel Richardson today and perform the whole range of

psychological tests that you considered appropriate and that were available, would you be able to determine today whether he suffered from antisocial personality disorder as of the time of the crime which was committed?

A. That was an awful long time ago. I don't think our state of the art would allow us to have a high degree of certainty of what somebody was doing or thinking fifteen or so years ago.

Q. What are the indicators of an antisocial personality disorder?

A. Antisocial behavior. I mean, sorry to sound glib, but that's basically what the indicators are. According to the DSM-IV, which is the document that is used to diagnose the disorder now, there has to be a pervasive pattern of disregard for and violation of the rights of others occurring since the age of 15, as indicated by three or more of the following:

Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.

Deceitfulness as indicated by repeated lying, use of aliases or conning others for personal profit or pleasure.

Impulsivity or failure to plan ahead.

Irritability and aggressiveness as indicated by repeated physical fights or assaults.

Reckless disregard for safety of self or others.

Consistent irresponsibility as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.

Lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

Another criteria is that the individuals is at least 18 years old.

The third criteria is that there is evidence of a conduct disorder with onset before the age of 15, and that the occurrence of antisocial behavior is not exclusively seen during the course of schizophrenia or manic disorder.

Q. Doctor Eubanks, could the commission of a violent crime be an indicator of an antisocial personality disorder?

A. I'm sorry. Could you repeat the question?

Q. Could the commission of a crime be an indicator of an antisocial personality disorder?

A. By definition, yes.

Q. If you encountered a situation where a person was accused of a crime, would you want to, as a psychologist, develop and investigate whether, in fact, there was a connection between the disorder and the crime?

A. As a psychologist, I would want to look at the development of background versus behavior, not crime, because it's not a legal analysis, it's a behavioral analysis.

Q. Dr. Eubanks, in your professional opinion, can a history of child abuse lead a person to do something in later

years that that person would not otherwise have done absence such abuse?

A. I don't think that you can say yes to that answer or no to that answer. It will depend. There is no direct "no, yes," if this happened as a child, these things will happen as an adult.

Q. Based on your - if you were to investigate the individual and examine the individual, would you be able to determine whether a strong correlation existed?

A. I think a case could be built for that, but again, it would have to depend upon what the data said, not what a preconceived idea would be.

Q. Faced with the evidence of the child abuse and the evidence of the behavior, the antisocial behavior later on, could you investigate the existence of a nexus between those two phenomena?

A. It could be investigated, yes.

Q. Could you actually develop evidence as a psychologist of a nexus there?

A. Within the restraints of psychological measuring and conceptualization, I think one could be developed if the data supported it.

Q. Is a person with a history of child abuse, Dr. Eubanks, likely to respond differently to a stressful situation than a person who has suffered no such abuse?

A. Yes, they are.

Q. May a person with a history of child abuse respond by lashing out?

A. That could be one of the ways that they could respond.

Q. By acting impulsively?

A. That could be one of the ways they would act out.

Q. By reacting violently?

A. Certainly.

Q. By using a weapon if the person had a weapon?

A. Certainly.

Q. Would an examination of Miguel Richardson today allow you to develop evidence to determine whether a history of child abuse the man suffered as a child contributed to the commission of the crime which he was accused later in life?

A. I would have to - it would depend upon what the data said, you know. I think it's something that could be done, but I don't know what the outcomes would be.

Q. Would an examination of Mr. Richardson and an examination of his records, such as they exist, allow you to investigate that and determine if there is a nexus?

A. The history that I've seen certainly set up what could be considered to be red flags to say there is something going on in this gentleman's life that would predict - early life

that would predict and lead to maladaptive and antisocial behaviors in later life. It certainly would offer rationale for further investigation.

Q. When you say red flags, would that be circumstances that would indicate that you should investigate?

A. That's right.

Q. Are you here today, Dr. Eubanks, to testify that there is such a nexus between the history of child abuse, if it occurred, and the crime?

A. No, I can't be.

Q. Okay. Have your views on the death penalty affected the opinions you have given today?

A. No.

Q. What are the opinions that you have given today based on?

A. The body of psychological knowledge that I've accumulated through my training and experience.

Q. Are you being paid today? Does that affect your opinion in any way?

A. I am not being paid, although I've been informed that a voucher will be put in to see if some kind of remuneration can be secured.

Q. And let me just step back for one moment because I want to make sure to clarify something. Is it your opinion that it would be more difficult now to determine a

nexus between the phenomena and history of child abuse, possible disorder, and later commission of a crime than it would have been in 1981?

A. The more distance between the possible causes and where we are in terms of time now, the more other variables have intruded into determining behavior.

Q. Would it be more difficult now, I take it from your earlier testimony, to determine what disorder, if any, Mr. Richardson may have suffered from in 1981?

A. Yes. I think so.

MR. LANE: Thank you, Dr. Eubanks. At this time, I'll pass the witness.

CROSS EXAMINATION ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Doctor, my name is Ed Shaughnessy. This is Roger Glass from the District Attorney's Office here in Bexar County. I take it you are a resident of Olmos Park; is that correct?

A. That's correct.

Q. And apparently from your resume you have lived in San Antonio for quite a period of time over the years.

A. I have.

Q. Were you a resident of San Antonio in March of 1979?

A. Let's see. I left - I was living in Houston at the time. I was in graduate school.

Q. Were you a resident of San Antonio in late 1981?

A. I was.

Q. All right. Do you recall the trial of Miguel Richardson?

A. I really don't.

Q. Or were you associated with it?

A. When I was told a little bit about it, there was a vague recollection, but I don't have any more than possibly remembering something about it.

Q. And you have reviewed two documents, I take it, regarding Mr. Richardson prior to testifying; is that correct?

A. I've actually reviewed quite a bit of stuff.

Q. Would you elaborate on what you reviewed?

A. Okay. There were medical records and documentation, reports about an incarceration that he had following an arrest and conviction for stealing some mail, a check.

MR. SHAUGHNESSY: May I approach the witness, Your Honor?

THE COURT: You may.

MR. SHAUGHNESSY: Could I see what you reviewed prior to your testimony?

THE WITNESS: Oh, sure.

MR. SHAUGHNESSY: Is any of this privileged?

MR. LANE: No.

THE WITNESS: And then these things about the careers and the affidavit from - let me make sure there is nothing else in here, please. Okay. You have it all.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Let me give you these back because we had access to these.

A. Okay. Thanks.

Q. Dr. Eubanks, is it your testimony or the summary of your testimony that based on what you reviewed, that a substantial possibility exists that in 1979 Miguel Richardson suffered from what is called an antisocial personality disorder?

A. No, that's not. My testimony says that there was an alleged history of child abuse and that this certainly could have great effects on a person's behavior. I don't know whether he met the criteria for antisocial personality disorder at that time or not.

Q. What would you need to review to determine whether or not Miguel Richardson was an antisocial personality in 1979?

A. Probably things that don't exist. Psychological evaluations of him growing through his childhood and adolescence and early adulthood.

Q. All right. You have the DSM-IV with you, right?

A. I do.

Q. And I believe we are talking about a list on page 649 and 50; is that right?

A. Correct.

Q. And at the bottom of 649 and the top of page 650, it contains what's labeled Diagnostic Criteria for a 301.7 antisocial personality disorder.

A. Right.

Q. Now, I'm a layman, and the rest of us here are layman in that respect.

A. Right.

Q. Is it my understanding, and am I correct in understanding that if someone meets these criteria, they are considered to be an antisocial personality; is that correct?

A. That would be the consensus of mental health. Yes.

it and we can move on. What harm is there in asking the question?

THE COURT: Mr. Lane, your objection is overruled.

THE WITNESS: This section?

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Yeah. The definition of incompetency to stand trial.

A. Okay. I don't see any indication in the record that he would meet these criteria.

Q. All right. Thank you very much.

MR. SHAUGHNESSY: Let me - may I approach the witness again, Your Honor?

THE COURT: You may.

BY MR. SHAUGHNESSY:

Q. Again, Doctor, referring to the 1981 Penal Code, the definitions of culpable mental states in Section 6.03 A and B. Let me show those to you. Here and right here. Could you read those to yourself?

MR. LANE: Your Honor, again, this is a clinical psychologist. He is not going to be examined on legal terms and legal meanings. We know that we apply their opinions towards legal findings, but for him to be cross examined on the legal terms themselves, I object to that.

THE COURT: Mr. Shaughnessy?

MR. SHAUGHNESSY: Well, Your Honor, I'm not cross examining him on what they are. I'm just going to do what I did immediately prior to this, and ask him whether there is any evidence that he's been exposed to that would indicate that Miguel Richardson, in 1979, would be incapable of forming one or the other of those culpable mental states. And if there is no evidence that he wasn't able to, then Mr. Cazier would not be ineffective for failing to prove it or pursue it.

THE COURT: The objection is overruled.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Have you had an opportunity to review?

A. Yeah. I'm on the second one. The wording is a little strange to me.

Q. It's stilted, there's no question.

A. Right. So, bear with me. I want to make sure I understand it fully, please.

Let me predicate this by saying there is always and shall be a difference between the legality of certain acts and the underlying behavioral predispositions to engage in activities, and that the two professions of law and psychology are not at odds in these but have different perspectives.

According to what I read here in the Penal Code, there is no indication to believe that he was not aware of what was going on in his immediate surroundings. According to mental health concepts, he could have been predisposed because of

his environmental and possible genetic variables to have engaged in activities which would lead to horrendous crimes.

Q. Right. And is it fair to say that there is no evidence that you have been exposed to that indicates, from a legal standpoint, as best you can understand it, that he was incapable of forming the intentional or the culpable mental state of acting intentionally or knowingly?

A. From what, as I understand it, I think that if we sat down and asked him what he was doing and why he was doing it and so forth, there may be reasonable, you may get reasonable answers to that.

Q. All right. But from what you have been exposed to, we have no reason to believe that he couldn't form one or the other of those culpable mental states?

MR. LANE: Objection, Your Honor, asked and answered twice.

THE COURT: Sustained.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Thank you, Doctor.

A. I need longer arms.

Q. Bigger books?

A. No. That's big enough.

Q. You don't have the DSM anymore?

A. I gave it to them.

Q. They can keep it. Let's go.

MR. SHAUGHNESSY: Can I approach the witness?

MR. LANE: I'll go ahead and give him his own copy. I don't want to make it inconvenient for him.

THE WITNESS: Thank you.

BY MR. SHAUGHNESSY:

Q. Doctor, I'm referring to 647, page 647, particularly associated features and disorders. Do you see that?

A. Yes.

Q. Okay. Now, once again, from the perspective

few on redirect.

THE COURT: All right.

MR. SHAUGHNESSY: Before we do that, Your Honor, let me tender back to the witness the documents that he was in possession of.

REDIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Dr. Eubanks, during the cross examination by Mr. Shaughnessy, he stated a number of facts which he stated he believed were supported in the record, and he asked you to pass upon whether they correspond to certain factors in the DSM. Do you recall that testimony?

A. I do.

Q. Now, I just want to be clear on this. Are you diagnosing, in your testimony did you mean to diagnose Miguel Richardson with antisocial personality disorder?

A. I did not.

Q. And in order to make any diagnosis or any examination, or reach any conclusion with respect to his condition, would it require more than the information Mr. Shaughnessy provided you?

A. I said that. Yes.

Q. And if you were to try and determine his condition as a professional, would it be customary for you to

rely on information supplied solely by, for instance, the District Attorney, if you were examining a defendant?

A. Not solely by anybody.

Q. Okay. You would want to consider other factors?

A. Correct.

Q. Now, I need to ask you to do this, but sometimes we have to pass upon our fellow professionals' work product. You have examined Betty Lou Schroeder's report; is that correct?

A. I have.

Q. And in your professional opinion, was the evidence in Betty Lou Schroeder's report adequate to support the opinions expressed in that report?

A. I don't think so, but she gave a diagnostic impression as opposed to a diagnosis. And I think that there could be some reason to say the impression is not a diagnosis.

Q. Okay. What is an impression versus a diagnosis?

A. I would imagine the degree of certainty that you use.

Q. Were the facts that were set forth in Mr. Shaughnessy's hypothetical even enough to base a diagnostic impression on?

A. We met two of the four criteria in the hypotheticals.

Q. And if you examined Mr. Richardson, would you consider other factors that might undermine that showing?

A. I certainly would want to go back and look at the conduct disorder areas. I would like to look at whether his behavior may have, in fact, been predicated upon abuse issues and environmental effects. I would want to look at whether there was a history in his parents and that generation of the same kinds of behaviors, not necessarily to the same degree, but to the same quality of antisocial or maladaptive behaviors to see if there might be a genetic component.

Q. I believe you stated that his actions might have sprung from genetic and environmental factors; is that correct?

A. Correct.

Q. And environmental factors, would include that history of child abuse?

A. Correct.

many attorneys may have defended those individuals? If you can only give a rough estimate, that's fine.

A. Here again, I would say defense attorneys, probably 12, 14.

Q. And has that situation changed substantially as we sit here today?

A. I think so, yes.

Q. Is it fair to say that there are three or four capital murder cases tried in this County a given year? Maybe even more?

A. More.

Q. To your knowledge, prior to this trial had Judge Dial ever presided over a capital murder trial in which the State was seeking the death penalty?

A. Yes, he had.

Q. Do you recall which one that was?

A. He tried Fred Durrough, I believe.

Q. Were you present for any of Durrough's trial?

A. Yes.

Q. And that portion would be, I take it, when Mr. Gifford testified?

A. Yes.

Q. Were you present during the course of the punishment phase of that trial?

A. I don't think so.

Q. All right. Do you know who represented Mr. Durrough at that trial?

A. Yes, I do.

Q. Who would that be?

A. Gerald Goldstein and Van Hilley.

Q. All right. Do you know if Mr. Goldstein and Mr. Hilley requested these what are now called Penry charges on behalf of Mr. Durrough in front of Judge Dial?

A. I don't know.

Q. All right. So, when you were representing Mr. Richardson, your decision on whether or not to request these charges, was that influenced one way or another by what Dial may have done or not done in the Durrough trial?

A. It had nothing to do with the Durrough trial, from my perspective.

Q. So, in your mind, did the possibility exist that --

MR. LANE: Your Honor, I believe he was still finishing his answer.

MR. SHAUGHNESSY: Go ahead.

THE WITNESS: I was only going to say that I never talked to Goldstein or Hilley about those instructions. The lawyers that I had talked to about those instructions were Sam Bashara and Sam Bayless, who had represented a person

whose name I want to say was Guillen, tried before Judge Ted Butler.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. And do you know whether Mr. Bayless and Mr. Bashara had successfully obtained those requested jury instructions?

A. They had. When I said with one exception, I didn't know of any other court ever granting those instructions. Judge Ted Butler did grant those instructions in the case that Mr. Bashara and Mr. Bayless tried, and that Defendant did receive a life sentence.

So then, at the time of Richardson's trial, at least one Judge in this County had given what is now known as a Penry charge?

A. Yes.

Q. And as far as you knew at the time of Richardson's trial, Judge Dial had never denied a Penry charge?

A. I don't know that he had ever had one requested, but I personally believed that he would not grant the charge.

Q. And ultimately he did not?

A. He did not.

Q. And, of course, you requested them in writing and preserved the error?

A. Yes.

Q. Okay. And that error, or perceived error, has been the subject of litigation in the appellate courts since when?

A. Well, certainly since the Richardson case got to the Court of Criminal Appeals.

Q. And that would have been in early 1983; is that correct?

A. I think so. Yes.

Q. And do you recall when Donald Franklin was executed, roughly?

A. '91, '92.

Q. All right.

MR. ROSENFELD: It's in evidence.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Did you discuss this charge with Judge Dial prior to - when I say charge, your Penry charge. I guess in context it could be called the Franklin charge.

A. Yeah.

Q. Did you discuss that charge with him prior to the charge conference that is in the record?

A. Not that I remember.

Q. All right. Did you discuss it with Mr. Williams?

A. I'm sure I did.

Q. All right. Did you discuss it with your client?

MR. LANE: Your Honor, I just want to clarify this. Is he inquiring into the subject matter of the instruction?

MR. SHAUGHNESSY: Right. The advisability of seeking this charge. Did you discuss that with your client?

MR. LANE: Your Honor, as to the subject matter, we don't have any objection.

THE WITNESS: I honestly don't remember.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. All right. There would be no down side to getting that charge, would there?

A. No.

Q. And the up side would have been that it

A. They would.

Q. They would have?

A. I think there probably would have been some inconsistency there, yes.

Q. Because it's my recollection, and I believe the record will support it, that Paquita Richardson testified that she and her brother, Miguel, grew up in a normal loving family; is that correct? Is that your recollection?

MR. LANE: Objection. We're characterizing the record again. It speaks for itself, according to Mr. Shaughnessy.

THE COURT: It's overruled.

THE WITNESS: Generally that's true. Yes.

BY MR. SHAUGHNESSY:

Q. And would you rather go to the jury with a conflict-free theory or would you rather try to take to them two different theories regarding your client?

A. Well, I would think you would want to avoid any conflict that you don't have to try to explain in front of a jury.

Q. So, is it then fair to say that there were down sides to presenting, or there would have been down sides to presenting this evidence of a turbulent childhood suffered by Miguel Richardson?

A. There would have arguably been a down side, yes.

Q. And virtually no down side to the testimony that you did present?

A. True.

Q. Because if memory serves me, Paquita Richardson had gone to college and was working for NASA at the time of the punishment phase; was she not?

A. She was.

Q. And was it a strategic decision on your part to present a professional woman with a college education who knew Miguel Richardson his entire life in an attempt to sway the jury to give him a sentence of less than death?

A. Yes.

Q. And if you were to try that case again, the punishment phase, tomorrow, and Paquita Richardson could still offer that testimony, would you try it again in that fashion?

A. In light of Penry, I'm not sure what I would do. I mean, in light of Penry, if I had my choice between Paquita and Julio, which one would I choose? I really don't know.

Q. But nevertheless, whatever it would be, it would be a strategic decision on your part?

A. True.

MR. SHAUGHNESSY: No further questions.

THE COURT: Let's take a break.

RECESS

THE COURT: Mr. Lane, let me ask you first, do you have any other witnesses?

MR. LANE: Your Honor, we have two witnesses after this. Well, we had Billie West on our list. He's going to be arriving tomorrow. We'll go with him and question him. As for today, I don't believe we have any today. Mr. Wetzel is somebody we intend to --

MR. SHAUGHNESSY: We have a witness, I guess, depending on - I guess it's semantics. We both want to have Mr. Wetzel testify. Who calls him, I guess, is - the State would call him out of order, if it's all right with counsel for the Petitioner.

MR. LANE: That's fine with us.

THE COURT: So we can anticipate finishing around 5:30, 6:00 o'clock?

MR. SHAUGHNESSY: Probably well before 5:30, I would think.

MR. LANE: Yes, Your Honor. I would imagine so. Now, when we finish up, we had mentioned to you before, we have one expert, Mr. Haney or Dr. Haney, we need to take out of turn. And also, I need to bring to your attention Roy Barrera, Sr.

THE COURT: I talked to him at lunch.

MR. LANE: His client was indicted. He is under water, and I would just ask - Mr. Shaughnessy has agreed that we take him out of turn later.

THE COURT: That's fine. Okay. You may proceed.

REDIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. I have a few more questions for you. You testified before the close of this, or before Mr. Shaughnessy was finished with you, Mr. Cazier, about what choice you would have made between two different theories at the penalty phase. Do you recall that testimony?

A. Yes.

Q. Okay. And that was a choice you didn't have absent the instruction; is that correct?

A. Well, I really didn't make that choice because, number one, I didn't know about the child abuse evidence, and so I was talking hypothetically what choice would I have made had I known about the child abuse. I'm just not sure.

Q. Let me ask you about that. Mr. Shaughnessy discussed his view, or presented to you that you would sift through all the facts available and decide what you wanted to pick out; is that correct?

A. Correct.

Q. Isn't it the case, though, that in defending a case, a capital case, you are really interested in developing evidence and investigating evidence, that you don't have the luxury to cast a wide net and just let it all sift out what you want?

A. I'm not sure I understand your question.

Q. Okay. In other words, had you been confident that you would get a Penry instruction, you would have actually been interested in developing the child abuse evidence; is that correct?

A. Well, see, at that time we didn't know what was Penry evidence and what wasn't. We didn't know what was Penry. All we knew was the jury should have some avenue for expressing their belief that there was some evidence that mitigated against death.

Q. In your experience, did the jury need some guidance to use the evidence that would be presented to it?

A. Well, that was our hopes in submitting the requested instructions, that the jury might, even though they really did honestly believe that this person might be dangerous in the future, they might nevertheless also believe that he didn't need to be executed. For whatever reason, whether it was because of a disadvantage childhood or because of some other reason. We didn't get the instruction.

Q. But absent your proposed instruction, is it your testimony that you were concerned that if you listed and put on child abuse evidence, it would only go against you and result in a finding of yes on the second issue?

A. At that time, it was my belief that child abuse evidence would support the anticipated testimony of Dr. Grigson.

Q. And when Mr. Shaughnessy asked whether Mrs. Richardson revealed to you evidence of child abuse, isn't it the case that you didn't ask her if he had been abused as a child?

A. I don't recall asking.

Q. Because you had no interest in developing that evidence?

A. I wasn't looking for it. I didn't ask. I didn't want to know.

Q. And the same was true of Mr. Richardson?

A. I don't remember asking him about what might be called child abuse, no.

Q. And the same was also true about Paquita?

A. I don't remember Paquita ever saying anything that wasn't pretty much rose-colored about her childhood with her brother and with her family.

Q. Now, if you had an expert who would testify that a person could live in an abusive household and yet still believe it was a normal, loving, supportive household, then that would reconcile any apparent conflict between those two views of the home that you might present in the penalty phase; is that right?

A. I would think so. Sure.

Q. But given the circumstances and the lack of any confidence on your part that you would obtain the instruction, you never had an opportunity to apply your strategic thinking to that puzzle, to that decision; is that correct?

A. Well, again, I didn't make a choice between offering or not offering child abuse evidence because I didn't know about the child abuse. I was surprised to learn what I learned when I read Julio Richardson's affidavit.

Q. And is it true by extension you didn't know about the child abuse at least in part because you didn't investigate it because it was not something you felt could possibly help your client?

A. That's true.

Q. And, in fact, it might very much harm your client?

A. I thought that it would.

MR. LANE: I have no further questions. Thank you for your time, Mr. Cazier.

RECROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. And it's also possible, even under the scheme utilized in penalty phases today, and the mitigating evidence charge that is submitted as a matter of law, that kind of evidence, that being child abuse evidence and the things that may or may not flow from it could still harm a given capital murder defendant at the punishment phase; could it not?

A. There are cases where it could, yes.

MR. SHAUGHNESSY: No further questions, Your Honor.

MR. LANE: Just one last.

REDIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Now days the jury is given a choice to consider it either way; is that right? Based on the instruction?

A. True.

MR. LANE: Your Honor, no further questions.

THE COURT: Thank you. You are excused.

(WHEREUPON, at this time, the
(Witness was excused.

MR. LANE: Before we turn to the issues relating to Mr. Wetzel's testimony, the Lackey evidence, we prepared a list of facts judicially